Filed 7/9/19 In re B.J. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re B.J., a Person Coming Under the Juvenile Court Law.	B294376
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. HECTOR P., Defendant and Appellant.	Los Angeles County Super. Ct. No. 18CCJP03729A

APPEAL from orders of the Superior Court of Los Angeles County, Pete R. Navarro, Juvenile Court Referee. Affirmed.

Gina Zaragoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

After finding that alcohol abuse by Hector P. (father) limited his ability to care for his infant daughter, B.J., the court declared B.J. a dependent of the court and removed her from father's custody. Father argues that the removal order was not supported by substantial evidence, that reasonable means existed to prevent removal, and that the court abused its discretion by ordering him to complete a drug and alcohol treatment program. We conclude there is substantial evidence B.J. was at risk of serious physical harm if returned to father's care, and the jurisdictional finding justifies the alcohol treatment order. We therefore affirm.

FACTUAL BACKGROUND[1]

Father and Latoya J. (mother) are the parents of B.J., an infant. Mother has four other children from previous relationships, all of whom have been permanently removed from her care. Father has a daughter from a previous relationship, born in 2005. She lives with her mother, and father sees her on weekends.

Father and mother had never been in a relationship. He was out of state when he learned mother was pregnant, and

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[1] Because the resolution of this appeal turns on the existence of substantial evidence to support the court's removal order, we state the facts in the light most favorable to the court's decision. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) As mother is not a party to this appeal, we focus on the evidence supporting the court's findings against father and discuss the facts relevant to other findings only as context requires.

returned to California when mother was about seven months along.

On May 10, 2018, about a month before B.J.'s birth, father accompanied mother to a prenatal visit, at which she tested positive for PCP. Father was surprised; he didn't know mother was a drug user. Mother told him the positive test was due to secondhand smoke. She later claimed it was caused by Advil PM.

Father was present for B.J.'s birth in June 2018, and cut her umbilical cord. Though neither mother nor B.J. was drug-tested when B.J. was born, B.J. appeared to be suffering symptoms of withdrawal at birth. The nurses had heard mother yelling at B.J. to stop crying because mother was tired and needed to sleep. B.J. was detained due to mother's positive prenatal drug test and her history of substance abuse.

Two weeks later, father tested positive for alcohol with a blood alcohol content (BAC) of 0.11%. Father testified that the test was the result of drinking at a friend's birthday party the previous evening. He had two beers and two shots of vodka at 11:30 p.m. The test was the next day, sometime between 4:00 and 4:45 in the afternoon.

Father has been convicted of two felonies and four misdemeanors. As relevant here, he was convicted of possessing a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in 2013 and 2014, both misdemeanors, and driving with a BAC above 0.08% (Veh. Code, § 23152, subd. (b)) in 2013, a misdemeanor.

Father has a history of alcohol and marijuana use. Mother told social workers he drank a lot—every day.[2] But father disputed that account: He claimed he drank every other weekend and didn't have a drinking problem. Father explained that when he was arrested for driving under the influence in 2013, he wasn't drunk. Nor was the possession conviction his fault: The cocaine belonged to a friend.

PROCEDURAL BACKGROUND

On June 12, 2018, the Los Angeles Department of Children and Family Services (Department) filed a dependency petition on behalf of B.J. alleging substantial risk of serious physical harm from mother's substance abuse and neglect of her other children. (Welf. & Inst. Code,[3] § 300, subds. (b)(1), (j).) Specifically, the petition alleged that mother had a 19-year history of illicit drug use, including of methamphetamine, cocaine, opiates, PCP, and marijuana; that she had tested positive for PCP while pregnant with B.J.; and that she had four other children who had received permanent placement services.

At the initial detention hearing on June 13, 2018, the court found the Department had made a prima facie showing that B.J.,

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[2] Mother said: "I don't want him to have the baby! He's the reason why they took her from me. He called social services on me because he's mad that I don't want to be with him. This is his way of getting at me because he's mad, but now he doesn't have the baby either, and I don't want him to have her. I don't like him, and I don't care for him. He's childish and he did this out of anger. My baby is suffering because of him. He drinks a lot. He drinks every day, and he can't take care of a baby."

[3] All undesignated statutory references are to the Welfare and Institutions Code.

who was still in the hospital suffering from suspected PCP withdrawal, was a person described by section 300. The court detained B.J. and removed her from both parents. It deferred a paternity finding.

On July 3, 2018, the Department filed an amended dependency petition. The petition added a third count, b-2, alleging that father had a history of substance abuse and was a current abuser of alcohol, which rendered him incapable of providing regular care and supervision to B.J., an infant. (§ 300, subd. (b)(1).) The amended petition noted that father had a positive alcohol test on June 22, 2018.

At the jurisdictional hearing on July 3, 2018, the court modified count b-2 of the amended petition, sustained the amended petition as modified, and found the parents' substance abuse warranted dependency jurisdiction.[4] Father was found to be the presumed father of B.J.

During the summer and fall, the disposition hearing was continued several times for ICWA compliance; it was ultimately held on November 30, 2018. At the hearing, the court declared B.J. a dependent of the court. The court commended father for trying to establish a relationship with his daughter, but removed B.J. from both parents and ordered her suitably placed because: neither the court nor the Department could determine where father lived; father did not have a realistic plan to care for five-

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[4] The court amended count b-2 to read "father … has a substance abuse history and is a current abuser of alcohol, which ~~renders the father incapable~~ *limits the father's ability* of providing regular care and supervision of the child." (Modified text in italics.)

month-old B.J.; and father had a sustained allegation of alcohol abuse and recent positive toxicology tests.

The court ordered reunification services for father and ordered him to complete a drug and alcohol program with random testing. Father was granted three two-hour unmonitored visits with B.J. per week but ordered not to consume substances within 24 hours of those visits. Because father had successfully completed parenting classes, the court did not order him to take them again. The court denied reunification services for mother. (§ 361.5, subd. (b)(11), (13).)

Father filed a timely notice of appeal. Mother is not a party to this appeal.

DISCUSSION

Father contends that there is no substantial evidence to support the court's removal order, that reasonable means existed to prevent removal, and that the court abused its discretion by ordering him to participate in a drug treatment program.

1. Removal Order

1.1. Legal Principles and Standard of Review

"After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. [Citation.] At the dispositional hearing, the court must decide where the child will live while under the court's supervision. [Citation.]" (*In re N.M.* (2011) 197 Cal.App.4th 159, 169.)

A juvenile court may remove a child from a parent with whom she resides only if the court finds, by clear and convincing evidence, that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the [child] if the [child] were returned home, and there

are no reasonable means by which the [child's health and safety] can be protected without removing the [child] from the ... parent's ... physical custody." (§ 361, subd. (c)(1); *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.)

"A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. [Citation.] 'The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.' [Citation.] The court may consider a parent's past conduct as well as present circumstances. [Citation.]" (*In re N.M.*, *supra*, 197 Cal.App.4th at pp. 169–170.)

We review removal orders for substantial evidence.[5]

1.2. The court could not determine where father lived.

On October 29, 2018, father testified that he lived on 113th Street; he asked the Department to conduct a home evaluation at that address. The apartment belongs to his cousin Cristina J.[6] The day after father testified, however, Cristina told a social

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[5] The courts disagree on whether we must account for the clear and convincing evidence standard in conducting this review. (Compare *In re Ashly F.*, *supra*, 225 Cal.App.4th at p. 809 [applying higher standard on appeal] with *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492–1493 [disregarding higher standard on appeal].) We need not resolve that issue, because our conclusion would be the same under either standard.

[6] Cristina had been evaluated as a possible caregiver soon after B.J.'s birth in June 2018, but was apparently rejected based on a 2002 sustained juvenile petition for robbery.

worker, "he doesn't live here and he hasn't been here." She said father and his mother had moved out of her home unexpectedly several months earlier, and she wouldn't allow them to return because they had not paid rent or given her any financial help.

The Department had previously sought to assess father's housing in San Bernardino, where he said he stayed on Sundays, and in Fontana, at a friend's home that, at various points, father had cited as his preferred placement for B.J. But father declined to give the Department either address. In light of this history, and since the information father had previously provided to the Department appeared to conflict with his testimony, the court ordered father to cooperate with the Department to arrange a home visit.

After speaking to Cristina on October 30, 2018, and learning that father hadn't lived with her for months, the Department visited an apartment in Inglewood on November 15, 2018. Father said he had been alternating between the Inglewood apartment and his cousin's home for several months. The apartment belonged to father's friend, who would not provide identification to the social worker. Father claimed he slept on the living room couch. The social worker didn't see any clothing in the living room, however, and asked father where he kept his belongings. Father said they were in San Bernardino with the friend who housed him on Sundays. (A few weeks later, father would testify that the social worker didn't see his clothes or toiletries because they were stashed in a closet that the social worker didn't open.) B.J.'s crib, clothes, and food, meanwhile, were with the Fontana friend. The social worker offered to provide father with subsidized housing referrals if he needed them, but father declined.

Two weeks after that, on November 30, 2018, father testified that he lived in the Inglewood apartment full-time, and had been living there for six or seven months. Notwithstanding his testimony the month before that he lived on 113th Street and his statements at the home visit that he alternated between the Inglewood address and the 113th Street address, this time he testified that the 113th Street apartment was merely his mailing address.

The court was understandably concerned about returning B.J. to father without any clear information about where B.J. would be living or any real home evaluation by the Department.

1.3. Father did not have a reasonable plan to care for B.J.

The court also properly concluded that father had no real plan to care for his infant daughter.

At the disposition hearing, father asked the court to release B.J. to him under a plan that would allow her to stay with Jettie M., the maternal cousin with whom she was placed. If the court released B.J. to father while leaving her with Jettie, however, Jettie would no longer receive government funding to care for B.J.

Father testified that Jettie had agreed to his plan, but there was no evidence that they had discussed—or that either of them understood—its large financial consequences. Father testified that he earns between $1100 and $1200 per month, of which he pays $450 per month in rent to his friend in Inglewood.[7]

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[7] We note that father rejected the Department's offer of a housing subsidy.

While father didn't know how much Jettie was paid for caring for B.J., he told her that "if she needed anything to call me. And I was willing to give her what is it that she needed, whether it be clothing or—" This appears to be at odds with his earlier statement to the court that he would reimburse Jettie for the lost government funding. In any event, there was no evidence that Jettie would be willing to continue to care for B.J. without government funding or that father could make up the shortfall.

1.4. There were no reasonable means to prevent removal.

Though father argues there were reasonable means to prevent B.J.'s removal, he does not suggest any. Instead, he argues that the court should have agreed to his plan to house B.J. with Jettie. As we discuss above, however, the court properly concluded that plan was not viable.

1.5. The removal order was proper.

Because B.J. "is an infant, 'the finding of substance abuse [by father] is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm.' [Citations.]" (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1220.) That's because " 'the absence of adequate supervision and care poses an inherent risk' " to the physical safety of children of tender years. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767.) And, since father had not begun a drug and alcohol treatment program at the time of the disposition hearing, the danger to B.J. was ongoing. (*In re Alexzander C.*

(2017) 18 Cal.App.5th 438, 452.)[8] Here, this prima facie showing was coupled with father's unascertainable residence, lack of a reasonable plan to care for B.J., and general lack of candor with the court. Taken together, this comprised substantial evidence of a substantial risk of physical harm.

2. Drug Treatment Order

Father also challenges the court's order that he attend a substance abuse treatment program.

Section 362, subdivision (d), provides: "The juvenile court may direct any reasonable orders to the parents or guardians of the child who is the subject of any proceedings under this chapter as the court deems necessary and proper to carry out this section, ... [including] a direction to participate in a counseling or education program ... ." (§ 362, subd. (d).) Under the statute, " '[t]he juvenile court has broad discretion to determine what would best serve and protect the child's interests and to fashion a dispositional order accordingly.' " (*In re A.E.* (2008) 168 Cal.App.4th 1, 4.) On appeal, " 'this determination cannot be reversed absent a clear abuse of discretion.' " (*Ibid.*) Accordingly, we may reverse only if the court's decision was arbitrary and capricious. (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

Here, the court sustained an allegation that father's current alcohol abuse limited his ability to provide regular care

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[8] Although father contends he does not have a substance abuse problem, the court found his testimony on that point to be incredible. And, while father emphasizes that the disposition hearing occurred five months after the positive alcohol test that had concerned the court, we note that father's most recent two tests had also been positive for substances.

and supervision for B.J., an infant. Ordering father to undergo alcohol treatment was well within the court's discretion. (*In re Christopher R.*, *supra*, 225 Cal.App.4th at pp. 1220–1221.)

DISPOSITION

The dispositional orders are affirmed.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.